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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1870~~ 188

FRANK M. JORDAN, etc.,

Petitioner,

vs.

S. L. WEAVER, *et al.*,

Respondents.

Brief of Fox West Coast Theatres Corporation as Amicus Curiae in Support of Petition for Certiorari.

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IN THE

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FRANK M. JORDAN, etc.,

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Brief of Fox West Coast Theatres Corporation as Amicus Curiae in Support of Petition for Certiorari.

Interest of Amicus Curiae.

Fox West Coast Theatres Corporation appeared, with leave of the respective courts, in the trial court and in the Supreme Court of the State of California, as an *amicus curiae* in behalf of the Secretary of State of the State of California, the petitioner here. *Amicus* is engaged in the business of operating, in the State of California, a considerable number of theatres in which entertainment or dramatic motion pictures, and as well, on various but separate and irregularly scheduled times, occasional closed-circuit telecasts of some sporting event, are exhibited to audiences drawn from the public at large. A fee is charged for admission to its theatres for the purpose of viewing, as the case may be, the motion pictures or the closed-circuit telecasts there

exhibited. The statute here involved declares the right of the public "to view any television on a home television set free of charge . . ." and thereby excludes the type of business carried on by *amicus* from its proscription. *Amicus*, therefore, has a direct interest in maintaining the constitutional validity of the statute.

Question Involved.

A state statute, in aid of preserving for the public the free, informational, educational and entertaining programs receivable without cost to the viewer on home television sets, prohibits the making of a charge for the privilege of so viewing television programs, but does not restrict in any way the programs themselves or the right to engage in the broadcasting of television programs. Does such a statute deny the freedom of press and speech secured by the First as incorporated into the Fourteenth Amendment, to a corporation desiring to exact a charge of viewers for receiving its telecasts on home sets?[1]

Reasons for Granting the Writ of Certiorari.

This case presents an important question involving the necessity of reconciling government's power of regulation over business with the constitutional guaranty of free speech and press. That question was decided below in a way that runs counter to the current of authority set in motion by this Court, and that restricts unduly the legislative power in the field of economic legislation. The specific grounds upon which this conclusion is based are set out immediately next.

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[1]The statute involved is reproduced in its entirety in footnote 1 of the opinion of the State Supreme Court. [See 64 Adv. Cal. 243, 246, 411 P. 2d 289, 291, 49 Cal. Rptr. 537, 538.]

1. Incidental or Indirect Effects Upon a Press Medium as the Consequence of Regulation of the Commercial Activities of the Medium Do Not Subordinate Government's Power of Regulation to the Guaranty of Free Press.

At the base of the decision below is the notion that the free Television Act effects a total prohibition of the right of respondents to engage in the television broadcast business and thus abridges their freedom of press and speech. That view of the matter ignores the vital distinction between the fulfillment of one's self by speaking, writing or publishing one's thoughts and the business of selling expression as a commodity. The right to speak, write or publish ordinarily is secured beyond the reach of direct regulation; but not necessarily from the incidental or indirect effects of legislation otherwise motivated.[2] [See, *Konigsberg v. State Bar*, 366

[2]The classic expression of the idea that freedom of speech and press is not absolute is, of course, the often-quoted comment of Holmes, J., writing for the Court in *Schenck v. United States*, 249 U.S. 47, 52, that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . ." Applications of that idea to less dramatic facts are readily found in the cases, such as, for example: *Lorain Journal Co. v. United States*, 342 U.S. 143, 153-156 (enjoining publication of advertisements that are part of an attempt to monopolize interstate trade); *Hughes v. Superior Court*, 339 U.S. 460, 465-466 (picketing for an unlawful objective or conducted in an unlawful way); *E. F. Drew Co. v. Federal Trade Com.*, 2 Cir., 235 F. 2d 735, 739-740, *cert. den.* 352 U.S. 969 (cease and desist order against false advertising). [See also, note 11, *infra.*]

This dichotomy between speech and business is well illustrated by contrasting the result in *Valentine v. Chrestensen*, 316 U.S. 52, 54, in which a "purely commercial" advertisement was held not beyond the regulatory power of a State, with the opposite result in *New York Times v. Sullivan*, 376 U.S. 254, 265-266, in which there was involved an advertisement that "communicated information, expressed opinions, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest interest and concern . . ."

U.S. 36, 50-51, and cases there cited.] But the right to engage in business—any business—is not secured beyond the regulatory power of government.[3] The mere fact, therefore, that regulation of a business may have some incidental effect on speech does not perforce bring the First Amendment into play to nullify the economically motivated legislation. The commercial dissemination of speech is a business, and as such is not made immune by the First Amendment from the kind of regulation to which business generally may be subjected. [See, the cases cited, notes 2, 5 and 11, *supra.*] Nor does the Amendment forbid economic regulation merely because an incidental or indirect effect of such regulation is some limitation of the otherwise "unfettered exercise" of the right of free speech or press. [See, *Konigsberg v. State Bar, supra,* 366 U.S., at 50-51, and the cases there cited.] And that is especially so when, as here, the regulation "ends in no restraint upon expression . . ." [*Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 193.[4]]

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[3]Since the end of the "Lochner-Coppage-Adkins" era [see *Olsen v. Nebraska,* 313 U.S. 236, 245] government's power to subject business to regulation in the public interest, including, when deemed desirable, complete prohibition, cannot be doubted. [See, *e.g., Ferguson v. Skrupa,* 372 U.S. 726; *Daniel v. Family Secur. L. Ins. Co.,* 336 U.S. 220; *Breard v. Alexandria,* 341 U.S. 622, 633; *Day-Brite Lighting Co. v. Missouri,* 342 U.S. 421. 425.]

[4]The regulation complained of in this case was the application to a newspaper publisher of the Fair Labor Standards Act. It is, therefore, significant that commodities produced in violation of the wage and overtime standards prescribed by that Act are *excluded entirely* from interstate commerce. [29 U.S.C.A., sec. 215(a)(1).] No question in *Oklahoma Press,* however, was "presented whether Congress could enforce its mandate by excluding from commerce the circulation of a publisher refusing to conform . . ." [327 U.S. at 193(n.8).]

Typical of the current of authority on this subject is *National Broadcasting Co. v. United States,* 319 U.S. 190, 226-227, in which one of the questions was whether the First Amendment prohibited FCC regulations that set standards, compliance with which was a condition to a broadcasting license. Those standards dealt with practices deemed by the Commission to be detrimental to the public interest and necessarily imposed restrictions on the broadcaster's freedom of expression, for they went to such matters as the broadcaster's choice of the nature, tenor and content of the programs he desired to broadcast. This Court, speaking through Mr. Justice Black, rejected the contention that the First Amendment was applicable. It said:

> ". . . The Regulations . . . abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. . . . The standard [the statute] provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground if valid under the Act, is not a denial of free speech."[5]

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[5]Similar decisions in which, for various reasons relating to the public interest, broadcast licenses were denied, thus completely suppressing the right to broadcast at all, are the following: *Federal Communic. Com. v. WOKO, Inc.*, 329 U.S. 223; *Immaculate Conception Church v. Federal Communic. Com.*, D.C. Cir., 320 F. 2d 795, *cert. den.* 375 U.S. 904; *Independent Broadcasting Co. v. Federal Communic. Com.*, D.C. Cir., 193 F. 2d 900, *cert. den.* 344 U.S. 837; *Mansfield Journal Co. v. Federal Communic. Com.*, D.C. Cir., 180 F. 2d 28.

These decisions take on an added significance when it is remembered that licensing is the classic example of the type of

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The holding below, that by prohibiting a charge for reception of respondents' speech, free speech has been denied, flies into the face of the decisions of which *National Broadcasting* is typical. In the first place, the prohibition of a charge for reception "ends in no restraint upon expression . . ." [*Oklahoma Press. Pub. Co. v. Walling, supra,* 327 U.S. at 193.] It is unrealistic to say that such a prohibition must end in suppression of speech, when all around us is the example of the great and thriving television and radio industries, for reception of whose programs no charge is made. In the second place, to hold, as against the technique of "balancing," that the First Amendment interdicts all regulation, even the incidental or indirect, regardless of the public interest in furtherance of which the regulation is adopted, is to take a view of the Amendment that this court has never taken, despite vigorous efforts to get it to do so.[6] [*Konigsberg v. State Bar, supra,*

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suppression and censorship against which the guaranty of free speech and press was aimed; and that the power to grant a license necessarily imports the power to deny it. [See, *Leloup v. Port of Mobile,* 127 U.S. 640, 645; *Sault Ste. Marie v. International Transit Co.,* 234 U.S. 333, 340.]

[6]The "balancing" view of the First Amendment was most actively advocated by Mr. Justice Frankfurter; it is, in his statement of it, that the "demands of free speech in a democratic society . . . are best served by candid and informed weighing of the competing interests . . . We are to set aside the judgment of those whose business it is to legislate only if there is no reasonable basis for it . . ." [*Dennis v. United States,* 341 U.S. 494, 524-525, Frankfurter, J., concurring.] Opposed is the view frequently advanced by Mr. Justice Black that the absolute language of the First Amendment should be read and applied absolutely. [See, his separate concurring or dissenting opinions in: *Ginzburg v. United States* (Dec. 7, 1965) .... U.S. ...., 16 L. ed. 2d 31, 41; *El Paso v. Simmons,* 379 U.S. 497, 516, and the cases there cited in note 1; *New York Times v. Sullivan supra,* 376 U.S. at 293.]

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366 U.S. 49-50; *American Communications Assn. v. Douds,* 339 U.S. 382, 398-399.] The limitation of speech, if any, effected by the Free Television Act is incidental and indirect. Speech, as such, and its nature, content and extent are left untouched.

The primary and direct object of the Act is regulation, in what has been legislatively determined to be the public interest, of commercial activity. That public interest is the preservation of a potent source of free information, instruction and entertainment, freely and readily available to the public at large, the existence of which, it could be conceivably and reasonably believed, was threatened by so-called subscription TV. [See, the dissenting opinion of Mosk, J., below, 64 A.C. at 272-273, 411 P. 2d at 308-309, 49 Cal. Rptr. at 556-557; Petition, Appendix B, pp. 53-55, in which the showing in this regard is summarized.] Balanced against that interest is the fact that the Act effects no denial of respondents' right, if they are so minded, to disseminate whatever they wish by means of television. They are left, so far as anything in the Free Television Act is concerned, in exactly the same position as those who now are and for many years have been telecasting freely.[7] The First Amendment

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Even so, Mr. Justice Black has expressed agreement with the "cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct . . ." [*Barenblatt v. United States,* 360 U.S. 109, 141, Black, J., dissenting.]

[7]The situation in this respect is akin to the one in *Estes v. Texas,* 381 U.S. 532, 539-540, 541-542, where, in response to the contention that barring of television from the courtroom during a trial was an abridgment of freedom of the press, it was pointed out that the television medium was free to cover the trial and inform the public in exactly the same way as other media—*i.e.,* by the presence and accounts of its reporters.

guarantees no more than that. It does not guarantee a right to charge for receiving (or hearing or seeing) one's exercise of the right of free speech or press, any more than it guarantees that one may compel another to hear or listen to a constitutionally secured expression of view or opinion.[8]

In balancing the governmental interest in preserving a source of popular enlightenment against denial of the power to charge a fee that is not essential to the business of telecasting, it "would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . ." [*Associated Press v. United States,* 326 U.S. 1, 20.] Yet, that is what has been done below. Legislation designed to preserve and encourage a widespread and publicly beneficial exercise of the right of free press has been held, because of the guaranty of such a press, to be beyond the State's power of regulation. That anomalous result highlights the fact that in an important area of constitu-

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[8]If there is a right to charge, it is one secured by substantive due process apart from any incorporation of the First Amendment—a right which respondents contended below had been unconstitutionally abridged by the Free Television Act. Neither court below put any apparent stock in that contention, for neither of them saw any need to discuss it. Rejection of respondents' due process contention is significant, however, in relation to free speech. It shows that it was not beyond the power of the legislature to determine that there was a reasonably conceivable state of facts that justified, in the public interest, the proscription of a charge for reception.

Would a governmental interest in preserving and encouraging an informed electorate be outweighed by a broadcaster's right to select when, how and what he will disseminate, so as to invalidate under the First Amendment, "equal time" statutes or regulations?

tional adjudication, the Court below has failed to appreciate and, therefore, has misapplied the decisions of this Court.

2. The "Clear and Present Danger" Test Was Erroneously Transformed Into a Means Whereby the Court Below Could Substitute Its Notions of Wise Policy for Those of the Legislature in a Matter Committed to the Legislature.

The court below misinterpreted the "clear and present danger" test and thus applied it in a way that subverts the teachings of this Court's decisions. It did not use that test as an objective standard by which to ascertain whether there is reasonable support for a legislative determination of the importance of the interest sought to be protected and of the necessity for the limitation of speech effected. Instead, it transformed the test into a device for substituting its judgment of the wise and desirable policy for that of the legislative department. [See, *e.g.*, Petition, Appendix B, pp. 24-29, 33; 64 A.C. at 252-255, 257-258, 411 P. 2d at 294-297, 299, 49 Cal. Rptr. at 543-545, 547.] That test was never intended to be a means by which a state court could invalidate, on federal grounds, a statute it did not like.

No doubt when the effect of legislation aimed at other interests is an incidental or indirect limitation of speech, the competing interests involved must be weighed or balanced. [See, *e.g., Konigsberg v. State Bar, supra,* 366 U.S. at 50-51, and the cases there cited.] But, at least in the first instance, weighing is the function of the legislature. [See, *Dennis v. United States, supra,* 341 U.S. at 539-540, Frankfurter, J., concurring; *Whitney v. California,* 274 U.S. 357, 374, Brandeis, J., con-

curring; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 497; *Gitlow v. New York*, 268 U.S. 652, 670.] The court's function is not basically different from what it is in any case in which a prerequisite to constitutionality is a reasonable relationship between the governmental interest involved and the limitation of individual right effected. [*Cf., Miller v. Schoene*, 276 U.S. 272, 279-280; *Berman v. Parker*, 348 U.S. 26, 33; *Day-Brite Lighting Co. v. Missouri, supra*, 342 U.S. at 425.] That function is to determine objectively whether it can be reasonably said, *i.e.*, could reasonable men believe, that the posited relationship exists. It is not to substitute its notions of wisdom or good policy for those of the legislature. The "problem is legislative where there are reasonable bases for legislative action . . ."[9] [*Breard v. Alevandria, supra*, 341 U.S. at 632-633.]

The court below, as the consequence of its professed view of the merits of the legislation, was enabled to balance away the governmental interest in it. That interest, as was expressly declared in the Act, was to preserve a source of public enlightenment and entertainment, against which the incidental, and indeed non-existent, limitation of speech effected by the Act was of lesser public importance. The relative weight of those interests was not a judicial question; the only judicial question was whether reasonable men could believe that there was

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[9]Of course, the principle is not different when the "legislature" is the people acting directly rather than through their representatives. [*Cf., Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-737. And, see: *Wallace v. Zinman*, 200 Cal. 585, 592, 254 Pac. 946, 949; *State v. Richardson*, 48 Ore. 309, 319, 85 Pac. 225, 229; *Commonwealth v. Higgins*, 277 Mass. 191, 178 N.E. 536, 537; *State v. Hogue*, 67 N.D. 251, 271 N.W. 677, 680.]

a basis in conceivable fact for the legislative determination. The court, however, arrogated to itself functions that are not open to it in deciding questions of federal constitutional law.[10]

3. The Court Below Failed to Give Due Consideration or Effect to the Decisions of This Court Refusing to Insulate Organs of the Commercial Press From Business Regulation.

It is plain that the court below treated this case as one of complete prohibition of speech. [See, *e.g., Petition,* Appendix B, pp. 24, 25; 64 A.C. at 251, 252, 411 P. 2d at 294, 295, 49 Cal. Rptr. at 542, 543.] When that is in fact the case, balancing or weighing may have only a small role to play. But, when the statute in question is aimed at another object, properly within the regulatory competence of government, an incidental or indirect effect on speech, as has been seen, requires that it be weighed or balanced against the governmental interest involved. The cases that perhaps best illustrate this proposition are those in which the defense to statutory regulation of business was invocation of the First Amendment. The upshot of the decisions is the proposition that, ". . . As the press has business aspects it has no special immunity from laws applicable to business in general . . ." [*Mabee v. White Plains Pub. Co.,* 327 U.S. 178, 184.]Pretty gen-

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[10]Manifestly, when it is a federal constitutional question that is involved, a state court cannot circumvent or subvert the claimed federal right by quirks of procedure or techniques of adjudication. This court will decide for itself whether the fair result of the decision below is to deny the right. [*Cf., Rogers v. Alabama,* 192 U.S. 226, 230-231; *Davis v. Wechsler,* 263 U.S. 22, 24-25.]

erally, in those cases, the governmental interest in preventing abusive, fraudulent or harmful business practices has been held to outweigh the incidental or indirect effects on speech.[11]

The court below gave virtually no consideration to the economic or business-regulation aspect of the Free Television Act. Indeed, the only consideration given was to denigrate the Act's primary objective, notwithstanding an express legislative declaration of it. [See, *Petition,* Appendix B, pp. 24-29, 33; 64 A.C. at 251-255, 257-258, 411 P. 2d at 294-297, 299, 49 Cal. Rptr. at 542-545, 547.] The relevant decisions [see *notes* 2, 5 and 11, *supra*] leave no doubt that speech, merely because it is speech, does not have primacy over economic regulation that is not designed to have and which does not have a direct effect on the right to speak. No doubt, the antitrust, labor-management and consumer-protection policies weighed in those decisions are important, and the government's interest in them is strong. But as much may rationally be said of a policy of encouraging public enlightenment and preserving a valuable means

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[11]In addition to those cited in notes 2 and 5, *supra,* the following cases are illustrative: *Associated Press v. United States,* 326 U.S. 1, 19-20—application of antitrust laws to a combination of newspaper publishers is not a denial of free press; freedom to publish is not freedom to keep others from publishing; *Oklahoma Press Pub. Co. v. Walling, supra,* 327 U.S. at 192-193—application of the Fair Labor Standards Act to a newspaper is not a denial of free press as it "ends in no restraint upon expression . . ."; *Donaldson v. Read Magazines,* 333 U.S. 178, 189-192—advance barring of fraudulent advertisements from mails is not a denial of free speech.

of acquiring it. Such a policy cannot be rejected out of hand because of dislike of the method of effectuating it.[12]

Conclusion.

The petition for a writ of certiorari to the Supreme Court of the State of California should be granted.

Respectfully submitted,

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[12]It is no argument against this view, that the means adopted to attain it consist of favoring one business or activity over another. [See, *Petition*, Appendix B, pp. 26-28; 64 A.C. at 253-254, 411 P. 2d at 296, 49 Cal. Rptr. at 544.] It has long been recognized, under the due process clause, that "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public . . ." [*Miller v. Schoene, supra*, 276 U.S. at 279.] Since, for reasons already noticed, the relative value of free- and pay-TV had to be and were weighed by the legislature, its determination should prevail unless wholly devoid of rational basis.